Supreme Court, U.S.
F I L E D

No. 95-1076 DEC 26 1995

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

TIMOTHY LAVON BUMPASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court constitutionally exercise jurisdiction under the Commerce Clause over a prosecution for possession of ammunition by a convicted felon, on the sole basis that the bullets in question had been manufactured out of state?

2. Under Federal Rule of Evidence 804(b)(3), which renders inadmissible a third party's hearsay statement against penal interest when offered to exculpate the accused, unless the circumstances surrounding the making of the statement show it clearly to be trustworthy, may a court infer a lack of trustworthiness from the fact that the proffered statement contradicts the trial testimony of prosecution witnesses?

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REASONS FOR GRANTING THE WRIT

1. This case squarely presents the important question, as to which circuit judges have disagreed, whether this Court's 1977 Scarborough decision remains good law after the 1995 Commerce Clause decision in Lopez 11

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Bumpass and the United States). Petitioner was indicted, stood trial and appealed alone. Petitioner knows of no related cases.

2. The decision below so gravely misconstrues the concept of "trustworthiness" under Fed.R.Evid. 804(b)(3), and so far departs from the norms of federal appellate review, that certiorari should be granted 15

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY LAVON BUMPASS respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on July 28, 1995, affirming his conviction for possession of ammunition by a previously convicted felon.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit (per Niemeyer, J., with Hall and Phillips, JJ.), affirming the petitioner's conviction and sentence in the United States District Court for the Middle District of North Carolina, was filed on July 28, 1995. It is published as United States v. Bumpass, 60 F.3d 1099; a copy is attached as Appendix A. The district court wrote no opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 28, 1995. On August 28, 1995, the court of appeals denied petitioner's timely-filed petition for rehearing. Appendix B. On November 16, 1995, the Chief Justice, sitting as Circuit Justice, extended the time for filing this petition to and including December 26, 1995. No. A-432; Appendix C. This petition is filed on or before that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF STATUTE, RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 922 of Title 18, United States Code, provides, in pertinent part:

> (g) It shall be unlawful for any person --
>
> (1) Who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
>
> * * * *
>
> To ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The **Commerce Clause** -- Article I, section 8, clause 3, of the Constitution of the United States -- provides, "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ...." **Clause 18** of that section of Article I provides that Congress shall have power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ...." The **Tenth Amendment** provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Rule 804 of the Federal Rules of Evidence, provides, in pertinent part:

Rule 804. Hearsay Exceptions; Declarant Unavailable

* * * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * *

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The Fifth Amendment to the United States Constitution guarantees, in part, that, "No person shall ... be deprived of life, liberty, or property, without due process of law ...."

STATEMENT OF THE CASE

The petitioner, Timothy L. Bumpass, who had a record as a former felon, was convicted of possessing ammunition which had been manufactured in another state. The prosecution theory was that petitioner possessed the ammunition in the course of shooting and injuring a man during a fight. The defense was that petitioner was innocent of the charge, because it was another participant who fired the shots.

A. Procedural History

A federal grand jury sitting in the Durham Division of the Middle District of North Carolina returned a one-count indictment on November 29, 1993, charging the petitioner, Timothy Lavon Bumpass, with being a person who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year and who had, on September 3, 1993, knowingly possessed ammunition "in commerce and affecting commerce," in violation of 18 U.S.C. § 922(g)(1). CA4 J.A. 7.

On January 12, 1994, the petitioner filed a Notice of his intent to introduce

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[1] Petitioner was originally charged on September 4, 1993, by local authorities with the shooting of Wallace Jones. He turned himself in on September 8, and was released on bond the next day. PSI (cover page), ¶9. He was arrested on a federal complaint and warrant November 2, 1993, and detained on the present charge. CA4 J.A. 3. After the federal trial, the state charges were dismissed. PSI ¶9.

into evidence at trial a hearsay statement of one Charlie Wilkerson, admitting that it was he and not the petitioner who had committed the shooting in connection with which the government proposed to prove that petitioner had allegedly possessed ammunition. CA4 J.A. 8. On January 13, 1994, the government filed a Response to this Notice, denying that Wilkerson was "unavailable" within the meaning of Fed.R.Evid. 804(a), and further demanding that the statement not be admitted unless the defense could meet the criteria of Fed.R.Evid. 804(b)(3) at a hearing in limine. CA4 J.A. 10. The district court did not rule upon the matter pretrial, however.

A one-day trial was held on January 31, 1994, before U.S. District Judge Richard C. Erwin and a jury. At trial, the defense called Charlie Wilkerson as a witness to ask whether it was actually he -- rather than petitioner -- who had shot Wallace Jones on September 3, 1993, during the fight at the Durham, North Carolina, McDonald's restaurant. A defense witness had attempted to testify that he heard Wilkerson that evening admit the shooting, but a prosecution hearsay objection was sustained. CA4 J.A. 132. Wilkerson claimed his privilege under the Fifth Amendment. CA4 J.A. 157-69. The defense was barred from introducing a signed statement, given by Wilkerson in his own handwriting to a Durham police officer, in which he

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[2] At that time, there was no discussion of Rule 804(b)(3).

admitted being the one who shot Jones.[3]

When the statement was offered, the trial judge asked the case agent directly, at side bar and not under oath, what he knew about Wilkerson. The agent replied that "there was some talk with reference to someone being paid to step forward for the shooting; that's the reason why he, in my opinion, has come forward to say that he's done it; because he doesn't have a criminal record." CA4 J.A. 162. When defense counsel immediately pointed out that this was not so, because Wilkerson in fact was on probation, the judge ordered him not to interrupt. Id. The court then suggested that the authorities should interview all the witnesses to find out whether "there is any shenanigan going on." CA4 J.A. 163 (sic). The prosecutor responded, however, that "the allegations regarding

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[3] The appellate briefs below make conflicting claims as to when Wilkerson gave his statement to the police. Compare Aplt. Br. 10 ("Mr. Wilkerson made this statement before the Defendant was even arrested"; accord, id. 12), with Gov't Br. 8 ("Wilkerson made this statement ... several days after the shooting ... and just after the defendant had been arrested."). Neither claim has any support in the record before the district court at the time of its ruling. The PSI asserts that the agents investigating the case verified that Wilkerson's statement was made to the Durham Police "shortly before the defendant turned himself in on September 8, 1993 ...." PSI ¶16.

someone offering payment for witness testimony are just that -- allegations. ... [A]t this point we have one person['s word] against another, saying those things." Id.

Wilkerson, on voir dire concerning his statement, confirmed under oath that he made the signed declaration, in his own handwriting, "because he [the policeman] asked me what happened." CA4 J.A. 166. Without addressing the question of trustworthiness under Fed.R. Evid. 804(b)(3) and without further explanation, the court excluded that exculpatory statement, saying only, "I think this man's pretty smart. I'm not going to let him put it in. If I make error, the Court of Appeals will correct it. Okay; I'm not going to let him put it in." CA4 J.A. 165 (sic).

Petitioner was convicted. On May 17, 1994, Judge Erwin sentenced petitioner as an "Armed Career Criminal" pursuant to 18 U.S.C. § 924(e) and USSG § 4B1.4, on the basis of three prior convictions for drug trafficking or violent crimes, to serve 262 months' (21 years and 10 months') imprisonment, to be followed by five years' supervised release, and to pay restitution of $123[5] and a $50 special assessment. Judgment

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[4] It is not clear from context or otherwise whether the trial court's expression "this man" referred to the defendant, to defense counsel, or to the witness, Wilkerson.

[5] $98 to the shooting victim and $25 to McDonald's for a damaged sign.

was entered May 31, 1994, making timely and immediately effective the notice of appeal which had been filed May 26.

On direct appeal, the United States Court of Appeals for the Fourth Circuit affirmed in a published opinion. United States v. Bumpass, 60 F.3d 1099 (4th Cir. 1995); Appx. A. The court held that the district court had had jurisdiction of the case "because the ammunition [that] was recovered ... was identified as coming from outside the state, thus satisfying the commerce requirement of 18 U.S.C. § 922(g)(1)." 60 F.3d at 1100 n.1; Appx. A-3. The court further held that the defense had not clearly shown the circumstances of the making of the exculpatory statement to be trustworthy. Id. at 1103; Appx. A11-12.

The court of appeals offered three reasons for its conclusion with respect to the exclusion of the exculpatory hearsay. First, the court relied on the unsupported assertion in the government's appellate brief that Wilkerson was a friend of the accused and the equally unsupported claim by the case agent that Wilkerson may have had a lesser record than the petitioner, so that if convicted he would suffer less severe punishment. Second, the court of appeals pointed out that the innuendo of corrupt payment was not "questioned" by any defense evidence. Third, the Fourth Circuit panel stated that the trial court could consider, in judging whether the statement against Wilkerson's interest was "trustworthy," that it contradicted the testimony of the prosecution's three eyewitnesses. 60 F.3d at 1103; Appx. A12.

The court below denied a petition for rehearing, with suggestion for

rehearing in banc, on August 28, 1995. App. B.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The district court's subject matter jurisdiction was invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. This petition contends, however, that the statute under which petitioner was prosecuted is unconstitutional in that it exceeds the scope of federal jurisdiction under the Commerce Clause. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed after sentencing and before entry of the judgment of sentence. Fed.R.Crim.P. 4(b).

B. Statement of Facts

On September 3, 1993, at a McDonald's hamburger restaurant in Durham, North Carolina, a fight broke out at around 11 p.m. among a half dozen young men. During the fight, Wallace Jones was shot in the thigh. The gun was not recovered, but police located a fully loaded magazine for a .9 mm handgun in a car in the parking lot, CA4 J.A. 66, 13 shell casings in the parking lot, and two shell casings and a bullet inside the restaurant. CA4 J.A. 72.

The government's evidence was that Wallace Jones and Christopher Hunter were fighting with Charlie Wilkerson, Kamal Bradshaw, and Antoine Braswell, after Bradshaw made "harassing" remarks to Jones and Hunter. Petitioner was not involved in the fight. Rather, Jones testified that during the fight petitioner "runs in" to the restaurant,

CA4 J.A. 30, told Wallace to "Get off my cousin" and then shot him four times in the leg with a nine millimeter handgun. CA4 J.A. 31. Hunter corroborated this testimony, as did another witness, one Whitaker. CA4 J.A. 39, 51. At that, everyone ran out.

Hunter admitted there was previous conflict between himself and Wilkerson, as well as between Wallace and Wilkerson. CA4 J.A. 42. Braswell testified as a defense witness that it was Wilkerson and not petitioner who shot Wallace. After the shooting, Braswell drove away with Wilkerson and saw him throw a pistol into a pond. CA4 J.A. 131-32. This was corroborated, in part, by Bradshaw, who did not see the actual shooting. Ronald Hunter testified for the defense, that the car in which the loaded magazine was found was his mother's, that he had been driving it that night, that petitioner had not been in that car, and that the magazine was his own. CA4 J.A. 141-42.

The trial evidence showed that the bullet and cartridges recovered from the scene of the McDonald's shooting were manufactured by Winchester for the Ruger 9 mm. handgun, CA4 Appx. 95-96, in particular by the Winchester Western Corporation, at its factory in East Alton, Illinois. (No evidence was offered as to when the manufacturing occurred.) Winchester does not manufacture ammunition in North Carolina. CA4 Appx. 106-07.

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[6] Braswell also testified that the prosecution's non-participant witness to the shooting, Whitaker, had not even been

REASONS FOR GRANTING THE WRIT

1. This case squarely presents the important question, as to which circuit judges have disagreed, whether this Court's 1977 Scarborough decision remains good law after the 1995 Commerce Clause decision in Lopez.

The Court should grant a writ of certiorari in this case to address an important constitutional question which arises in the wake of United States v. Lopez, 514 U.S. --, 131 L.Ed.2d 626, 115 S.Ct. 1624 (April 26, 1995). Federal jurisdiction was predicated in this case on the basis that petitioner allegedly possessed ammunition (as stated in the indictment) "in commerce and affecting commerce," quoting 18 U.S.C. § 922(g), in that the bullets had been manufactured out of state and thus necessarily had been transported in interstate commerce at some prior time. This basis of jurisdiction was arguably held in Scarborough v. United States, 431 U.S. 563 (1977), to meet minimum standards under the Commerce Clause. The Court held in that case that a convicted felon's possession of a gun "affects commerce" within the meaning of § 922(g)'s predecessor statute if the gun has ever been transported across a state line, even prior to the time that the defendant suffered his felony conviction.

In Lopez, this Court held unconstitutional the attempt of Congress to create a federal offense of possession of

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(cont'd)

present. Defense witness Hunter said the same. CA4 J.A. 146.

a firearm within 1000 feet of a school, 18 U.S.C. § 922(q). No statutory element of conduct by the defendant in interstate commerce or affecting commerce had to be proved in an individual prosecution under the Gun-Free School Zones Act, nor had Congress made any contemporaneous findings of the existence of such an impact from the possession of guns near schools generally. Most important, even if Congress had made such findings, the Court held that any impact on commerce of such non-commercial activity would be so remote and indirect that to allow it as a basis for federal jurisdiction would allow Congress's Commerce Clause power to operate without any limit, thus overturning the doctrine of limited federal powers enshrined in the fabric of the Constitution and emphasized in the Tenth Amendment.

In addition to the court below,[7] two circuits have upheld challenges to § 922(g) in the wake of Lopez, albeit with only limited analysis. The Ninth Circuit has said so in two cases, without discussion. See United States v. Collins, 61 F.3d 1379, 1383-84 (9th Cir. 1995); United States v. Hanna, 55 F.3d 1456, 1461-62 & n.2 (9th Cir. 1995) (citing then-very-recent Lopez decision; asser-

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[7] As noted above, although the question of the validity of § 922(g) under the Commerce Clause was not raised in the district court or the court of appeals in this case, it was addressed summarily by the Fourth Circuit; 60 F.3d at 1100 n.1; Appx. A3 (citing neither Scarborough nor Lopez).

ting, without further analysis, that proof firearm had ever traveled interstate would satisfy Constitution).

The court in United States v. Mosby, 60 F.3d 454 (8th Cir. 1995), offered a somewhat more careful analysis, attempting to distinguish Lopez on the basis that this Court gave a restrictive reading to the concept of "affecting commerce" but that the separate category of Congressional regulation of material "in commerce" was not restricted, and thus could still be said to validate laws restricting possession of objects that have ever traveled interstate -- no matter how long they had come to rest in one place -- even when the regulated or prohibited possession itself bears no present relationship to commerce. Mosby went so far as to apply this analysis to possession by the convicted felon of ammunition manufactured within his own state from components manufactured out of state.

Scarborough seems to assume that the rationale adopted in Mosby and by the court below -- that possession of an item whose manufacture "affected commerce" and which has at least once been shipped "in commerce," no matter when -- is constitutionally proper, although it does not explain why. It is not clear that the apparent reasoning of Scarborough is consistent with Lopez in this respect. As Judge Becker points out in his dissenting opinion in United States v. Bishop, 66 F.3d 569 (3d Cir. 1995), a carjacking case which thus directly involved the theft of an instrumentality of interstate commerce, Scarborough "did not engage in any analysis of the authority of Congress to enact laws under

the Commerce Clause." Id. at 594. Furthermore, "the broad application of the statute in Scarborough is probably undermined by Lopez." Id. at 595 n.13.

The facts of this case involve the most mundane of local crimes: a midnight brawl in a public eatery that escalated into a nonfatal shooting of one participant by another. No commercial activity, interstate travel, or other federal interest is implicated, either by the shooting or by the petitioner's alleged possession of ammunition. The government showed that the ammunition found at the scene of the McDonald's shooting was manufactured in Illinois, not in North Carolina. It did not offer any evidence as to when the ammunition was made, or where petitioner had purchased it, if he did. Although this issue was not raised on direct appeal, it is obviously important and is clearly presented on the existing record. In light of our modern interstate consumer economy, if the rationale of Mosby and the court below were to prevail, there would once again be no limit on what the federal government could regulate or ban, and no limit on the power to federalize traditionally local areas of criminal law concern. There is no crime or potential crime that Congress could not describe in some way as affecting a person or thing (or a person's relationship to a thing) that was either made out of state, or in competition with things made out of state, or has previously traveled in commerce.

The Court should grant certiorari to overrule the implicit constitutional holding of Scarborough and to demonstrate that the decision in Lopez requires a

greater rethinking of recent assumptions about the scope of federal legislative authority than most of the lower courts have yet recognized.

2. The decision below so gravely misconstrues the concept of "trustworthiness" under Fed.R.Evid. 804(b)(3), and so far departs from the norms of federal appellate review, that certiorari should be granted.

The Court should also grant certiorari in this case because the Fourth Circuit's opinion below upholds an indefensible misapplication of Fed.R. Evid. 804(b)(3), and does so in violation of several fundamental norms of federal appellate review. None of the three elements of the court of appeals' rationale for affirmance can withstand scrutiny as a matter of logic or fairness.

The evidence question in this case concerns the trial court's exclusion of a critical piece of exculpatory evidence: the voluntary statement of another person (one Wilkerson) that he, and not petitioner, committed the shooting, and thus possessed the ammunition, which gave rise to this conviction. Rule 804(b)(3) establishes declarations against interest, including statements against the declarant's penal interest, as an exception to the hearsay rule when the declarant is unavailable. The Rule thus overruled the federal common law of evidence, as declared by this Court in Donnelly v. United States, 228 U.S. 243, 272-77 (1913), which refused to extend the exception from statements against pecuniary interest to those against penal

interest. Justice Holmes, joined by Justices Hughes and Lurton, lodged a famous dissent, which endorsed Wigmore's critique of the English limitation. Id. at 277-78. The Federal Rule contains an important qualification, however, added by Congress to the Advisory Committee's reform proposal, making such hearsay inadmissible to exculpate the accused unless "corroborating circumstances clearly indicate the trustworthiness of the statement." This case presents an opportunity for this Court to consider the meaning of that requirement.

If, as the court of appeals held, the district court did not err under Fed.R.Evid. 804(b)(3) by excluding the statement in petitioner's case, because the corroborating circumstances do not satisfy the rule's standard of trustworthiness, then that rule, as applied, violates a defendant's right under the Due Process Clause of the Fifth Amendment to the United States Constitution to present a defense. See Chambers v. Mississippi, 410 U.S. 284 (1973); 2 McCormick on Evidence § 318, at 341 n.9 (4th ed. J.W. Strong 1992) (discussing relationship of Rule 804(b)(3) and Chambers). As Judge Weinstein has written, "The trial court should only ask for sufficient cooroboration to 'clearly' permit a reasonable man to believe that the statement might have been made in good faith and that it could be true. ... The burden placed on the accused to corroborate should not be too high." 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶804(b)(3)[03], at 804-158, 804-160 (1995). Weinstein cites a Fourth Circuit case as the paradigm example of how too "stringent" an appli-

cation of this clause can strip the hearsay exception of its "utility." Id. at 804-160 & n.12. The decision of the Fourth Circuit below suffers the same flaws.

The court of appeals commenced its explanation of the affirmance of the trial court's ruling with a misreading of the record, and every element of its rationale is equally flawed. First, the court of appeals stated:

> The [lower] court expressly invited Bumpass to bring to court the witnesses who could corroborate the statement and testify to its circumstances. In the absence of further corroboration, however, we cannot conclude that the district court abused its discretion in finding the trustworthiness of the statement not clearly established.

60 F.3d at 1103; Appx. A11. In fact, there was no such invitation, express or otherwise. To the contrary, even before the defense had made its offer on the trustworthiness issue, the lower court expressed its agreement with the government. The prosecutor, anticipating the defense position, said, "I'm still going to argue that the statement can't come in." To this, the court responded, "I don't think it can either." After this, the court commented:

> I think this case has gone a mighty long way on simple possession of ammunition.[ ] I think we ought to have all

> the witness - everybody [-] interviewed - and see whether or not there is any shenanigan going on. If there is, I think we should issue bench warrants for everybody involved. Now, it's going to be up to you to get the bench warrant issued. I'm not going to issue it.

CA4 J.A. 163. Whatever this statement means, it cannot plausibly be construed, as the Fourth Circuit panel seemingly did, as an invitation to the defense to bring in witnesses to corroborate Wilkerson's admission.

The court of appeals' reasoning is no more sound than its reading of the record. The first reason was:

> The trustworthiness of the statement was placed in some

(cont'd)

[8] As noted above, the trial of this case lasted but one day, despite the calling of some 16 witnesses. The defendant-petitioner, facing a prison sentence of over 20 years, claimed complete innocence. It is hard to see how the case could be said to have "gone a mighty long way" or to be "simple."

[9] By "you," the court was apparently addressing the prosecutor. It is not clear who the court meant by "we" or why a "bench warrant" would be an appropriate tool either for subpoenaing trial witnesses or for investigating a suspected endeavor to obstruct justice.

> doubt by Agent McCluny and by the factual circumstances. Bumpass and Wilkerson were friends, and, because Bumpass apparently had a more substantial criminal history than Wilkerson, even though Wilkerson was on probation, Wilkerson would therefore receive a lesser penalty if he took responsibility for the shooting, as the parties realized. Thus, there was a motive for Wilkerson to give the self-inculpatory statement.

60 F.3d at 1103; Appx. A11. There is nothing whatsoever in the record of this case to support the claim that "Bumpass and Wilkerson were friends." That assertion was made in the government's brief on appeal, without citation to the record. It could not be used as any sort of basis for a proper appellate decision. The claim that "Bumpass apparently had a more substantial criminal history than Wilkerson, even though Wilkerson was on probation" is hardly any sounder. This suggestion comes from the case agent's unsworn statement, as partially contradicted (and perhaps corrected) by defense counsel. Nor was there any basis for the trial court to think petitioner "realized" this, even if it were true. Thus, all three factual components of the court of appeals' first rationale lack any basis in the record.

Second, the court of appeals pointed out that "While there is no evidence that Bumpass paid Wilkerson to take responsi-

bility for the shooting, the specter of that possibility was never put in doubt or even questioned by any evidence presented by Bumpass." Id. The defense cannot properly or fairly be taxed for not offering evidence to contradict a "specter of [a] possibility" consisting of innuendo injected by an agent, which the prosecutor immediately disavowed any reliance on, calling it "allegations" and "one person's word against another's." This makeweight argument shows the weakness of the court's opinion.

Finally, the Fourth Circuit panel stated that the trial court could consider, in judging whether the statement against Wilkerson's interest was "trustworthy" under Rule 804(b)(3), that it contradicted the testimony of the prosecution's three eyewitnesses:

> Moreover, three eyewitnesses testified that they saw Bumpass shoot Jones, including one of Bumpass' friends who expressed reluctance to testify against him. Even though the assessment of such evidence is the responsibility of the jury in determining the defendant's

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[10] The probation office reported that after investigation the possibility that the defendant had offered to pay someone to take the blame could only be described as "rumors," with nothing "to substantiate the claim." PSI ¶16 (declining to recommend any penalty under the Sentencing Guidelines for "obstruction of justice.")

> guilt, such evidence may also be considered by the court when ruling on the trustworthiness of hearsay, an evidentiary question which is committed to the court for decision.

60 F.3d at 1103; Appx. A12. The Court should grant certiorari to make crystal clear that defense evidence cannot be excluded under any construction of the Federal Rules, or as a matter of Due Process, on the basis that it contradicts the government's evidence. Nothing could be more clear than that the "trustworthiness" requirement of Rule 804 cannot, under any circumstances, be construed to mean that a judge can reject defense evidence because it is inconsistent with the prosecutor's case. "The corroboration requirement should not be used as a means of usurping the jury's function." J. Weinstein & M. Berger, supra, at 804-161.

Other circuits' cases illustrate clearly what may be required under Rule 804 to establish trustworthiness of another person's confession, offered to exculpate the accused. See generally Annot. (Bourdeau), When Do Corroborating Circumstances Clearly Indicate Trustworthiness of Hearsay Statement Tending to Expose Declarant to Criminal Liability and Offered to Exculpate Accused, So as to Permit Admission of Statement Under Rule 804(b)(3) of Federal Rules of Evidence?, 125 ALR Fed 477; 4 J. Weinstein & M. Berger, supra, at 804-157 to -161 nn. 7-11 (cataloging cases). For example, the court held in United States v. Arthur, 949 F.2d 211 (6th Cir. 1991),

that when the District Court refuses to allow into evidence statements that are corroborated by other substantial evidence, then it has abused its discretion under Rule 804(b)(3). The court found that there was considerable corroboration of the declarant's confession, including a picture of the declarant in the bank in question several hours before the robbery, his own testimony as a witness before he exercised his Fifth Amendment rights, his brother's confession to the FBI in which he stated that the declarant, and not the appellant, assisted in the robbery, and the government's own theory and contention that only two men actually carried out the robbery. These circumstances are directly comparable to those present in petitioner's case.

Likewise, in United States v. Hilliard, 11 F.3d 618 (6th Cir. 1993), cert. denied, 127 L.Ed.2d 412, 114 S.Ct. 1099 (1994), the court reversed the refusal to allow the statement of a codefendant to police into evidence under Rule 804(b)(3) that was corroborated by other substantial evidence. The district court had excluded the declarant's statement for a single reason: the declarant declined to sign a written confession at the police station after making a statement to police during the search that was exculpatory to the defendant. This fact, said the appellate court, was not dispositive of the issue of trustworthiness.

Similarly, in United States v. Garcia, 986 F.2d 1135 (7th Cir. 1993), the court overturned a refusal to admit the statement of a codefendant to a policeman where there was sufficient evidence to corroborate the trustworthi-

ness of the proffered testimony. The declarant gave a full confession on arrest and told police that the appellant was ignorant of the presence of the marijuana in the truck and of the plan to distribute it. The court recognized that where two individuals do not have a close relationship, this may be an important corroborating circumstance as to the trustworthiness of a hearsay statement. It is also pertinent that a confessor makes a voluntary statement after being advised of his Miranda rights, and where no evidence exists that this statement was made in order to curry favor with authorities. United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990). In opposition, the government argued that the declarant's statement to police contained several inconsistencies that cast doubt on their veracity. The court, however, found this argument unconvincing.

In this case, Wilkerson made his statement voluntarily to police, in his own hand, and signed it. There is no evidence that he had anything to gain from doing so. Even if it is true that he would have faced less punishment than petitioner if charged with this offense, why should he falsely accept any blame for petitioner's sake? Apparently, he had a motive to shoot Jones, and at least one witness heard him make other incriminating remarks on the night of the shooting and saw him throw away a gun. Only through a misconstruction of Rule 804(b)(3) so unsympathetic as to render it an unconstitutional impediment to the defense of the innocent, coupled with several violations of basic norms of appellate decision-making, could the

trial court's decision in this case be affirmed.

For this reason as well, a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner TIMOTHY L. BUMPASS prays that this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand to the United States District Court with instructions to dismiss (for the first reason) or grant a new trial.

Respectfully submitted,
LAW OFFICES OF
ALAN ELLIS, P.C.

by: Peter Goldberger

12/95

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,
v.
Timothy Lavon BUMPASS, Defendant-Appellant.

No. 94-5421.
United States Court of Appeals,
Fourth Circuit.
Argued March 9, 1995.
Decided July 28, 1995.

60 F.3d 1099

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ARGUED: William Joseph Cotter, Rigsbee & Cotter, Durham, NC, for appellant.
Sandra Jane Hairston, Sp. Asst. U.S. Atty., Greensboro, NC, for appellee.
ON BRIEF: Walter C. Holton, Jr., U.S. Atty., Greensboro, NC, for appellee.

Before HALL and NIEMEYER, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

OPINION

NIEMEYER, Circuit Judge:

At 11:00 p.m. on September 3, 1993, at a McDonald's restaurant in Durham, North Carolina, a fight which had begun earlier between two groups of men resumed. Wallace Jones and Christopher Hunter were fighting Kamal Bradshaw, Antoine Braswell, and Charlie Wilkerson. Jones was engaged with Bradshaw while Hunter was engaged with Braswell and Wilkerson. During the course of the

brawl, the defendant Timothy Lavon Bumpass entered the restaurant and allegedly stated to Jones, "Get off my cousin," and then fired a 9mm gun, hitting Jones in the thigh four times. The victim Jones testified that when he was shot he was looking Bumpass straight in the face. Jonathan Whitaker, who had seen Bumpass shortly before the fight outside the restaurant leaning against a Mercedes Benz, witnessed the shooting, as did Jones' friend, Hunter. Jones, Whitaker, and Hunter all testified that Bumpass had used a 9mm handgun, and Hunter stated that he had seen Bumpass on a previous occasion with this firearm. After the shooting, Bumpass fled the restaurant.

Braswell testified to the contrary, stating that after Bumpass came into the restaurant and said, "Get off my friend," it was Wilkerson who then came in and shot Jones. Braswell testified that he accompanied Wilkerson thereafter when Wilkerson threw an "object" or "pistol" into a pond. Braswell did not know what type of gun was disposed of or what type Wilkerson had been carrying.

After the police arrived, they recovered one bullet and two shells from the floor of the restaurant where Jones had been shot and a number of other shell casings from outside the restaurant near the Mercedes. They also recovered a loaded 9mm clip from the Mercedes. Hunter testified that the loaded 9mm clip was his and that he owned a 9mm handgun "for protection." Ballistic tests revealed that the shells and the bullet were fired from a single 9mm gun, but the gun was never recovered.

Bumpass was later arrested and charged with possession of ammunition as a convicted felon, in violation of[1] 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Following his conviction by a

------- Page 60 F.3d 1101 follows -------

jury, the court sentenced him to 262 months imprisonment.

On appeal Bumpass challenges his conviction, contending that at trial the district court improperly excluded a statement written by Wilkerson confessing that it was he (Wilkerson) who shot Jones on the night in question. Bumpass also contends that the district court improperly displayed partiality by making certain comments during trial and by aggressively questioning a witness. For the reasons that follow, we affirm.

I

A few days after Wallace Jones was shot but before defendant Bumpass was arrested, Charlie Wilkerson, a friend of Bumpass, went to see Durham Police Detective Dowdy and gave a written statement confessing to having shot Jones. The government produced the statement, written in Wilkerson's own hand, to Bumpass before trial.

At trial, Bumpass called Wilkerson to testify in Bumpass' defense. When

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[1] While there was ample evidence that Bumpass also possessed a firearm, he was charged with possessing ammunition because the ammunition was recovered and the brand was identified as coming from outside the state, thus satisfying the commerce requirement of 18 U.S.C. § 922(g)(1).

asked whether he shot Jones, Wilkerson invoked his Fifth Amendment privilege against self-incrimination and refused to testify. Bumpass then sought to introduce Wilkerson's written statement as a declaration against interest under [2] Federal Rule of Evidence 804(b)(3). At the bench conference which followed to determine whether to allow Wilkerson to

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[2] This exception to the rule against hearsay provides that if the declarant is unavailable, the following type of statement is not excluded as hearsay:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Fed.R.Evid. 804(b)(3).

refuse to testify and whether to admit his written statement under Rule 804(b)(3), the court asked Agent McCluny, the government's investigator, whether he thought Wilkerson was involved in the shooting. McCluny stated:

> I don't think he did the shooting. Through the investigation we found there was some talk with reference to someone being paid to step forward for the shooting; and that's the reason why [Wilkerson], in my opinion, has come forward to say that he's done it; because he doesn't have a criminal record.

The court, expressing concern about "someone paying [Wilkerson]" to take the fall, stated, "If he's lying, I think he ought to go to jail." The court then allowed Wilkerson to refuse to testify, but also refused to admit Wilkerson's written statement without further corroboration or clarification of the circumstances surrounding its creation. The court said to counsel during the bench conference on this issue:

> I think this case has gone a mighty long way on simple possession of ammunition. I think we ought to have all the witnesses -- everybody interviewed -- and see whether or not there is any shenanigan going on. If there is, I think we should issue bench warrants for everybody

> involved. Now, it's going to be up to you to get the bench warrant issued.

After observing skeptically that Wilkerson was "pretty smart," the court announced that it was not going to let his statement into evidence. Bumpass objected but took no further steps. He now challenges this evidentiary ruling.

[1][2] Federal Rule of Evidence 802 provides that hearsay is not admissible into evidence except as provided by law, and Rule 804 provides exceptions to Rule 802 when the declarant is unavailable as a witness. In particular, Rule 804(b)(3) allows admission of hearsay of an unavailable declarant when

> [the] statement ... at the time of its making ... so far tended to subject the declarant to civil or criminal liability ... that a reasonable person in declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating

------- Page 60 F.3d 1102 follows -------

> circumstances clearly indicate the trustworthiness of the statement.

(Emphasis added). Thus, hearsay may be admitted under this exception if (1) the declarant is unavailable, (2) the statement is genuinely adverse to the

declarant's penal interest, and (3) "corroborating circumstances clearly indicate the trustworthiness of the statement." The party offering the statement bears the "formidable burden" of meeting the requirements of Rule 804(b)(3), and the court's decision on its admissibility is reviewed for abuse of discretion. See United States v. MacDonald, 688 F.2d 224, 233 (4th Cir.1982), cert. denied, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983).

In this case, satisfaction of the first two requirements is not disputed. Wilkerson, the declarant, was unavailable, having asserted his constitutional privilege against self-incrimination. See Fed.R.Evid. 804(a)(1); United States v. Brainard, 690 F.2d 1117, 1124 (4th Cir. 1982). Wilkerson's statement was also adverse to his penal interest. A statement made to the police admitting involvement in a criminal act, such as that made by Wilkerson, is adverse because of the potential for criminal liability. See MacDonald.

[3] It is the third requirement -- the existence of corroborating circumstances -- that is the center of contention in this case. In Brainard, we discussed the nature and purpose of the corroborating circumstances requirement in a case, similar to that now before us, where the declarant's statement "went to the heart of the defense." We observed:

> The requirement of corroborating circumstances was designed to protect against the possibility that a statement would be fabricated to exculpate the

> accused. Thus, the Advisory Committee explained the requirement of corroborating circumstances as follows:
>
> > [O]ne senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant.
>
> F.R.Evid. 804(b)(3), Advisory Committee Notes. The rule requires not a determination that the declarant is credible, but a finding that the circumstances clearly indicate that the statement was not fabricated. It is the statement rather than the declarant which must be trustworthy.

690 F.2d at 1124. In explaining the burden on the offering party, we stated that the corroborating circumstances need not "remove all doubt with respect to the hearsay statement." Id. at 1125 n. 14. Rather, the rule requires only that the corroborating circumstances "clearly indicate the trustworthiness of the statement." Id. See also 4 Jack B. Weinstein & Margaret A. Berger,

Weinstein's Evidence, 804(b)(3)[03], at 804-155 (1994) ("the burden placed on the accused to corroborate should not be too high"). But it must be remembered that admission of such hearsay leaves the party against whom it is offered without the important benefit of cross examination. The level of corroboration therefore must be sufficient that cross examination would add little to test the hearsay's reliability.

[4] Although the precise nature of the corroboration required by Rule 804(b)(3) cannot be fully described, the courts have identified several factors which are relevant to determining whether sufficient corroboration exists to justify admitting a statement under the rule, including (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant with the accused, and (6) the nature and strength of independent evidence relevant to the conduct in question. See Brainard, 690 F.2d at 1125; United States v. Noel, 938 F.2d 685, 688 (6th Cir.1991); United States v. Slaughter, 891 F.2d 691, 698 (9th Cir.1989).

To support his argument that Wilkerson's statement was sufficiently trustworthy to be

------- Page 60 F.3d 1103 follows ------

admitted, Bumpass relies on the fact that Wilkerson gave his statement to the

police before Bumpass was arrested and that Wilkerson thereby exposed himself to criminal liability contrary to his penal interest. Bumpass notes further that Wilkerson was placed at the scene of the shooting by witnesses for both the prosecution and the defense, and that Wilkerson was involved in the fighting with Jones and Hunter which ended in Jones' being shot. Finally, Bumpass directs our attention to the evidence that Wilkerson later threw an "object" or "pistol" into a pond. Bumpass argues that any suggestions that Wilkerson agreed to take responsibility in exchange for money were just rumors without testimonial support, and that even the government's attorney agreed that such suggestions were "just allegations." At bottom, Bumpass maintains that corroborating circumstances clearly demonstrated the trustworthiness of Wilkerson's statement and that therefore the statement should have been admitted. Bumpass argues that in any event any question about Wilkerson's credibility should have been committed to the jury and not to the court.

The government, in response, contends that Wilkerson was a friend of the defendant Bumpass and had a motive to take responsibility for the shooting because of Bumpass' substantial criminal record. The government notes that Wilkerson's written statement to Detective Dowdy was given several days after the shooting and is directly contradicted by three eyewitnesses who identified Bumpass as the person who shot Jones on September 3. Further, one of the persons identifying Bumpass as the shooter, Jonathan Whitaker, was a

friend of
Bumpass who was reluctant to testify against him and was therefore, according to the government, particularly trustworthy. The government contends that Bumpass did not succeed in meeting his burden under Rule 804(b)(3) of indicating circumstances which corroborated the trustworthiness of Wilkerson's statement and that therefore the district court did not abuse its discretion in excluding the statement.

[5] Recognizing that Bumpass carries the burden of clearly establishing by corroborating circumstances that Wilkerson's statement was trustworthy, we cannot say that the district court abused its discretion in concluding that Bumpass failed to satisfy this burden. The court expressly invited Bumpass to bring to court the witnesses who could corroborate the statement and testify to its circumstances. In the absence of further corroboration, however, we cannot conclude that the district court abused its discretion in finding the trustworthiness of the statement not clearly established. The trustworthiness of the statement was placed in some doubt by Agent McCluny and by the factual circumstances. Bumpass and Wilkerson were friends, and, because Bumpass apparently had a more substantial criminal history than Wilkerson, even though Wilkerson was on probation, Wilkerson would therefore receive a lesser penalty if he took responsibility for the shooting, as the parties realized. Thus, there was a motive for Wilkerson to give the self-inculpatory statement. While there is no evidence that Bumpass paid Wilkerson to take responsibility for the shooting, the

specter of that possibility was never put in doubt or even questioned by any evidence presented by Bumpass. Moreover, three eyewitnesses testified that they saw Bumpass shoot Jones, including one of Bumpass' friends who expressed reluctance to testify against him. Even though the assessment of such evidence is the responsibility of the jury in determining the defendant's guilt, such evidence may also be considered by the court when ruling on the trustworthiness of hearsay, an evidentiary question which is committed to the court for decision. In the totality of these circumstances, we cannot say that the district court abused its discretion in excluding Wilkerson's written statement in the absence of corroborating circumstances clearly indicating the statement's trustworthiness.

II

[6] Bumpass also contends that the district judge made several comments to defense witnesses during trial which were unfairly prejudicial to him and which implied that the court had formed an opinion that he was guilty. See United States v. Parodi, 703 F.2d 768, 775-78 (4th Cir.1983) (assessing

------- Page 60 F.3d 1104. follows -----

whether the district judge displayed partiality depriving the defendant of a fair trial based on the judge's questioning of witnesses and other conduct). We have reviewed the portions of the transcript adverted to by Bumpass, including the judge's somewhat extensive examination of witness Christopher Hunter relating to a collateral issue of

whether Hunter properly was in possession of a handgun, and conclude that the district judge's comments did not amount to a display of partiality sufficient to deprive Bumpass of a fair trial. Accordingly, we conclude that Bumpass was not deprived of his constitutional right to a fair and impartial trial.

For the reasons given, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 28 1995

No. 94-5421
CR-93-238

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

TIMOTHY LAVON BUMPASS
Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considerd the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Bert M. Montague
CLERK

APPENDIX C

By letter dated November 16, the Clerk informed counsel as follows:

Re: Timothy Lavon Bumpass
v. United States
Application No. A-432

Dear Mr. Goldberger:

The application for extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on November 16, 1995, extended the time to and including December 26, 1995.